WONG KEE CHONG

v.

FOLIN & BROTHERS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ RAHIM J
[COMPANIES WINDING-UP NO: 28-66-1980]
15 SEPTEMBER 2010

COMPANY LAW: *Liquidators - Removal of - Application for - Failure to carry out duty - Whether allegations of impropriety against liquidators made out - Whether leave required for application to remove liquidators - Companies Act 1965, s. 232(1)*

The respondents were appointed liquidators of Folin & Brothers Sdn Bhd ('Folin Brothers') after its winding-up by the court. The applicants were contributories of Folin Brothers and together held 75% of the shares in the company. Folin Brothers, in turn, held 99% of the shares in Folin Food Processing Sdn Bhd ('Folin Food'). By virtue of being liquidators of Folin Brothers, the liquidators took up one share each in Folin Food to become directors in Folin Food representing the interests of Folin Brothers. The liquidators proposed to wind-up and dissolve Folin Brothers by bringing about a voluntary winding-up of Folin Food. They planned for an Extraordinary Meeting (EGM) of Folin Food to get its shareholders to agree to the proposal. But before the EGM could take place, the applicants commenced an oppression petition under s. 181 of the Companies Act 1965 ('the Act') against the liquidators as directors of Folin Food and to injunct the EGM. The oppression petition was settled by way of a consent order under which the shares of Folin Food were to be valued and sold at a fair market value to the applicants. The consent order contained a clause denying liberty to file afresh which meant the applicants could not re-agitate in a further action or petition the same grounds that had been canvassed in the oppression petition. Against this background, the applicants filed an application under s. 232(1) of the Act to remove the liquidators and replace them with someone of their choice. The liquidators, *inter alia*, said the application should fail as leave for it had not been obtained and that the applicants were estopped from raising matters they had already raised in the oppression petition.

Held (dismissing the application):

(1) Leave for the application was not required under s. 232(1) of the Companies Act 1965. Cases for removal of liquidators where no leave is required must be distinguished from cases where action is

proposed against a liquidator for some alleged wrongdoings in the performance of his official duty as a liquidator: *Zainal Abidin Putih & Anor v. Che Wan DVPT Sdn Bhd*, *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow*. (paras 20 & 21)

(2) Most of the issues raised in the instant application against the liquidators had been raised in the oppression petition. The consent order in the oppression petition estopped the applicants from raising the same issues again in this application. The applicants, by taking a completely inconsistent stand in this proceedings by raising issues which have been settled by the consent order, were abusing the court process for their advantage. (paras 23 & 30)

(3) A liquidator is to act in the interest of the company, its contributories and creditors and not for themselves. Thus, to remove a creditor it must be shown that the liquidator can no longer act impartially and objectively to protect those mentioned interests. Herein, by challenging the valuation of Folin Food Processing Sdn Bhd's shares by Ernst & Young as being manifestly low compared to the share actual market value, the respondents had demonstrated their impartiality and integrity in protecting the interests of the company Folin Brothers and its creditors. The applicants had failed to show that the liquidator were no longer fit and proper persons to continue as liquidators for Folin Brothers (paras 36-38)

Case(s) referred to:

Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 7 CLJ 516; [2007] 10 CLJ 7 HC ***(refd)***

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow [1995] 4 CLJ 11 CA ***(refd)***

Goh Nellie v. Goh Lian Teck & Ors [2007] 1 SLR 453 ***(refd)***

Greenhalgh v. Mallard [1947] All ER 255 ***(refd)***

Jerry Ngiam Swee Beng v. Abdul Rahman Mohd Rashid & Anor [2003] 3 CLJ 739 HC ***(refd)***

Ricky Thong Yew Fook v. OCBC Bank (M) Bhd & Ors [2007] 10 CLJ 720 HC ***(refd)***

See Teow Guan & Others v. Kian Joo Holdings Sdn Bhd & Ors [2009] 1 LNS 1030 HC ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur [2009] 1 LNS 1457 HC ***(refd)***

Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors & Another Appeal [2010] 2 CLJ 858 CA ***(refd)***

Zainal Abidin Putih & Anor v. Che Wan DVPT Sdn Bhd [1992] 3 CLJ 1539; [1992] 1 CLJ (Rep) 381 SC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 181, 232(1)
Companies Winding-Up Rules 1972, r. 173

For the applicant - Ira Biswas (Shamala Balasundram & Firdaus with her); M/s Chooi & Co
For the 1st respondent - Fiona Bodipalar (Darren Lai & James Chow with her); M/s Bodipalar Ponnudurai De Silva
For the 2nd respondent - PH Cheah; M/s Raja Eleena Siew Ang & Assocs

Reported by Ashok Kumar

JUDGMENT

Abdul Aziz Rahim J:

[1] The application in encl. 368 is dismissed with costs to respondent and costs to be paid by the applicants.

[2] The application is to remove the respondents as several and joint liquidators of the company Folin & Brothers Sdn Bhd ('Folin Brothers') and to replace the respondents with one Yeap Cheng Chuan. The application is made under s. 232(1) of the Companies Act 1965.

[3] Under s. 232(1), a liquidator appointed by court may resign or on cause shown be removed by the court.

[4] The respondents are court's appointed liquidators. A committee of inspection was formed in 2006 for the purpose of the winding up of Folin Brothers and the applicants are members of the committee. However, the meeting of contributories was only held in that year at the request of the 3rd applicant. Also the 1st applicant is the largest creditor of Folin Brothers and has filed his proof of debt with the liquidators of Folin Brothers for a sum of RM194,000.

[5] The applicants are contributories of Folin Brothers and together they hold 75% of the shares in Folin Brothers. And Folin Brothers hold 99% shares in Folin Food Processing Sdn Bhd. Other than the shareholding in Folin Food Processing Sdn Bhd, Folin Brothers practically has no business of its own. Its business principally revolves around the business of Folin Food Processing Sdn Bhd.

[6] As for Folin Food Processing Sdn Bhd, its real asset is a piece of property known as Lot 316, in Seksyen 14 Petaling Jaya, Selangor ("Lot 316") which was generating some rental revenue at the time. Lot 316, however was subject to a charge and was facing foreclosure proceedings by Standard Chartered Bank Berhad in respect of monies allegedly owing to the bank.

[7] Folin Brothers was ordered to be wound up in 1987 by a court order dated 8 April 1987 obtained on a petition presented by the 3rd applicant because he was excluded from the management of Folin Brothers. This is not in dispute. The respondents in this case succeeded the previous liquidator for Folin Brothers, on their appointment by the court on an application by the 1st applicant. On taking over the company, they inherited a number of legal suits in which involved Folin Brothers and Folin Food Processing Sdn Bhd with other third parties which the respondents have to take care of and which they did. This is evident in paras. 8 to 16 of 1st respondent's affidavit in reply (1). This is also not in dispute.

[8] By virtue of their being liquidators of Folin Brothers (which holds 99% shares in Folin Food Processing Sdn Bhd, the respondents also took up one share each in Folin Food Processing Sdn Bhd in order to be appointed as directors in Folin Food Processing Sdn Bhd representing the majority interests which is Folin Brothers. As liquidators of Folin Brothers, their primary duty is of course to bring the winding up process to conclusion and dissolves Folin Brothers. One way they proposed to do this is to propose a voluntary wind-up of Folin Food Processing Sdn Bhd. To this end, they have obtained Folin Food Processing Sdn Bhd Board of Directors' resolution to propose the suggestion for voting by the shareholders of Folin Food Processing Sdn Bhd. And accordingly they planned for an EGM to get the shareholders of Folin Food Processing Sdn Bhd to sanction the proposal for voluntary winding up of the company.

[9] But before the EGM could take place, the applicants commenced an oppression petition (the oppression petition) under s. 181 of the Companies Act 1965 against the respondents as Directors of Folin Food Processing Sdn Bhd and to injunct the EGM.

[10] However, the oppression petition was later settled by way of "consent order" dated 4 June 2009. Under the consent order a firm of Accountants and Auditors Ernst & Young was appointed to evaluate the shares of Folin Food Processing Sdn Bhd for the purpose of selling it to the petitioners (ie, the applicants) at a fair market value. The petitioners under the consent order are to enter into a sale and purchase agreement of those shares and thereafter Folin Food Processing Sdn Bhd would be voluntary wound up and subsequently dissolved.

[11] Ernst & Young valued the shares in Folin Food Processing Sdn Bhd at RM2,942,131.

[12] In paras. 21 to 31 of his affidavit in reply (1) to the plaintiff's affidavit in support of the application, the 1st respondent expressed concerned about the value of the shares given by Ernst & Young. In

the opinion of the respondents then, the value was too low and took the position that the valuation was inherently flawed compared to other evidence available to them. Therefore, in the belief of the respondents the valuation by Ernst & Young was not in accordance with the term of the consent order and does not represent a fair price of the shares in Folin Food Processing Sdn Bhd.

[13] In para. 24 of his affidavit in reply (1), the 1st respondent deposed that Ernst & Young's report purportedly rely on a previous valuation of Lot 316 by First Pacific Valuers Property Consultants Sdn Bhd (First Pacific) which valued Lot 316 at RM5.9 million. He further deposed that this value is ridiculously low as there have been at least three offers by various parties for Lot 316 in 2007 ranging from RM9 million to RM12.4 millions. One of the offers was for RM10.8 million and it was unconditional offer and at the time to affirmation of the affidavit, is still valid. The 1st respondent also deposed that he and the 2nd respondent have caused Messrs Khong & Jaafar to prepare a valuation on Lot 316 and the value ascribed by them is RM10.5 million. It was further deposed in para. 24 of the 1st respondent affidavit in reply (1) that the 1st applicant himself has opined that the value of Lot 16 was in excess of RM15 million.

[14] In para. 25 of his affidavit in reply (1) the 1st respondent deposed that during the course of the oppression petition the purchasers of Folin Food Processing Sdn Bhd shares has offered RM7,136,680 for the shares. It was also deposed that valuation by Ernst & Young was based on the audited financial statements of Folin Food Processing Sdn Bhd for the financial year ended 31 December 2007 and the management report for the financial year 31 December 2008. It was pointed out that the management report relied on by Ernst & Young constitute draft accounts prepared at the behest of the 1st applicant herein and which have been queried and disputed by the respondents when it tabled for discussion at the Extra General Meeting Folin Food Processing Sdn Bhd on 14 August 2009. It was also contended that the draft accounts relied on by Ernst & Young in its valuation of Folin Food Processing Sdn Bhd shares contained liabilities that were included by the auditors even though these were expenses not authorized or were under dispute. According to the 1st respondent neither he nor the 2nd respondent or both of them were consulted on the draft account despite they forming the majority of the Board of Directors of Folin Food Processing Sdn Bhd and representing the major shareholder owning over 99% Folin Food Processing Sdn Bhd. It was also deposed that the respondent never commissioned or authorized the valuation of Lot 316 by First Pacific and which was relied on by Ernst & Young in their valuation of Folin Food Processing Sdn Bhd shares. On the foregoing evidence in the 1st respondent's affidavit in reply (1), I am not surprised that the

respondents are concerned with the valuation of Folin Food Processing Sdn Bhd's shares by Ernst & Young. As consequent thereof, the Respondents has filed an action on 14 December 2009 in KL High Court Suit No. D22-NCC-647-2009 (the 647 Suit) against the applicants, Ernst & Young and with Folin Food Processing Sdn Bhd as a nominal party to challenge the valuation and to adjudicate on the matter. The applicants in term has filed a counter claim seeking specific performance of the sale and purchase agreement under the consent order. The 647 Suit is still pending before the court.

[15] The consent order also contains a term of no liberty to file afresh. This means the petitioners in the oppression petition (which includes the applicants) cannot file any further action on the same grounds as canvassed in the oppression petition either in another (fresh) petition or other actions.

[16] It is to be appreciated that it is against these backgrounds and under these circumstances, the applicant filed encl. 368.

[17] In the application, the applicants raised several complaints against the respondents. Upon considering the complaints, I would group them into four major ones. Firstly, it was said the respondents have made an unauthorized payment to the lawyers in defending them in respect of the oppression petition and that payment was for the respondents own benefit, because in the oppression petition the respondents were sued as directors of Folin Food Processing Sdn Bhd; not as liquidators of Folin Brothers. So it was argued that the respondents cannot and should not use the asset of Folin Brothers to pay the lawyers' fees. It was further argued that the oppression petition had nothing to do with Folin Brothers wound up; it was about the oppression of the minority in Folin Food Processing Sdn Bhd. Secondly, it was alleged that the respondents have made unsubstantiated or double payments to certain legal firms in particular Mathews & Co and Joseph Yeo & Co. Thirdly, it was alleged that the respondents disregarded the request by Committee of Inspection for the audited account of Folin Brothers. Fourthly, the applicants complained that the respondents have failed to abide by the consent order of 4 June 2009 in the oppression petition. On these grounds, it was submitted for the applicants that the respondents are not fit and proper person to be liquidators for Folin Brothers and have asked them to be removed.

[18] For the respondents it was argued that the applicants are estopped from making this application because most, if not all the allegations raised against the respondents in the application, have already been raised in the oppression petition. For that reason, it was argued that this

application is an abuse of process. And in her written submissions encl. 392, learned counsel for the respondents also raised a procedural point, that is, leave is required by the applicants before proceeding against the respondents as liquidators; and the applicants have not obtained any leave of court to proceed with this application. Therefore, it was argued that the application in encl. 368 is defective and incompetent before this court. Alternatively it was argued that even if the court does not agree with the issue on estoppels and procedural point raised by the respondents, the application ought to fail on its merits.

Court's Opinion

[19] On the issue of leave, 1st respondent cited the cases of *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516; [2007] 10 CLJ 7; *Jerry Ngiam Swee Beng v. Abdul Rahman Mohd Rashid & Anor* [2003] 3 CLJ 739; *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors & Another Appeal* [2010] 2 CLJ 858 and *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [2009] 1 LNS 1030 for the proposition that leave of court is necessary before the liquidators could be removed from office. It is a fact that no leave was obtained for this application in encl. 368 and therefore the 1st respondent submitted that the application must be dismissed *in limine*.

[20] On this issue I agree with the submissions by learned counsel for the applicants that leave is not necessary. The provision of s. 232(1) of the Companies Act 1965 pursuant to which this application was made is crystal clear that no leave is required. That section reads: 'A liquidator appointed by the court may resign or on cause shown be removed by the court'. The authorities cited by the 1st respondent are not supportive of the proposition suggested by the 1st respondent. They are cases where action were proposed against the liquidator in respect of the performance of his official duties. In *Abric Project Management Sdn Bhd (supra)* for instance, serious allegations were directed against the liquidator personally in respect of a sale of land belonging to the company and the applicant in that case was a contributor and former director of the company who sought to challenge and set aside the sale. It was not a case for the removal of the liquidator.

[21] The reason for the requirement of leave for action against a liquidator is that a liquidator is an officer of the court. He is answerable for his action not only to the shareholders, contributories and creditors of the company of which he was appointed to be the liquidator; he is also answerable to the court for his action as liquidator. Thus the court will not permit its officer to be sued without investigation of the merits of the case. Therefore learned counsel for the applicants is correct to

submit that cases for removal of liquidators where no leave is required must be distinguished from cases where action is proposed against a liquidator for some alleged wrongdoings in the performance of his official duty as a liquidator: *Zainal Abidin Putih & Anor v. Che Wan DVPT Sdn Bhd* [1992] 3 CLJ 1539; [1992] 1 CLJ (Rep) 381; *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* [1995] 4 CLJ 11.

[22] Next is on the issue of estoppels. The applicants contend that the doctrine does not apply in this instant case. The applicants argued that all the 18 grounds raised in this application were not raised in the oppression petition except for the refusal of the 1st respondent to sign cheques and the misstatements by the liquidators ie the respondents that certain sums are receivables in the Form 66 of Folin Food Processing Sdn Bhd when the auditors have said they are not.

[23] The respondents however contend otherwise. And in her written submissions in encl. 389 learned counsel for the respondents has attached Annexure 3 which is a table of comparison of issues raised in the applicant's affidavit supporting this application and the issues raised in the oppression petition. I have perused Annexure 3 with great care and I must say that I agree with the respondents' contention that most of the issues raised in this application against the liquidators have been raised in the oppression petition. They may not be exactly identical issues but they are indeed similar.

[24] In *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, the then Supreme Court held that 'when a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the *res judicata*, as the judgment has becomes the truth between such parties. an estoppels *per rem judicatum* has been created as a result'. The court there went on to explain that there are two kinds of estoppels *per rem judicatum* - cause of action estoppels and issue estoppels. The former prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. The latter prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceedings. The court also held that the doctrine of *res judicata* is an estoppels based on public policy and the policy requires that there should be a finality in litigation. Because of that, the court says it has inherent jurisdiction to dismiss an action by applying the doctrine *res judicata* even though it is not pleaded. The court also said that the doctrine applies to cases where parties should have brought an action or issue in earlier action but have failed to do so deliberately or inadvertently.

[25] The authorities also have established that for an issue estoppel to apply four main conditions must be fulfilled. Firstly, the order obtained must be final and conclusive on their merits. Secondly, the judgment in respect of which the issue of estoppels is raised must be by court of competent jurisdiction. Thirdly, there must be identity between the parties to the two actions and fourthly, there must be identity of issues or subject matter in the two proceedings in the sense that the prior action must traverse the same ground as the subsequent proceedings and the facts and circumstance giving rise to the earlier decision must not have changed.

[26] In this instant case, the oppression petition was settled by way of a consent order and one of the terms of the consent order is that there shall be no liberty to file afresh. Thus the consent order put to rest once and for all, all the issues in dispute between the parties in the oppression petition and those issues, if there are similar or the same and if there are based on same or similar facts and circumstance may not be raised again in any subsequent action either on same cause of action or in a different cause of action: *Ricky Thong Yew Fook v. OCBC Bank (M) Bhd & Ors* [2007] 10 CLJ 720; *Greenhalgh v. Mallard* [1947] All ER 255 and *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur* [2009] 1 LNS 1457.

[27] In *Goh Nellie v. Goh Lian Teck & Ors* [2007] 1 SLR 453, it was held that a consent order could form the basis of an issue estoppels as long as the order was a final order. In this instant case there is no issue that the court that entered the consent order was a court of competent jurisdiction and that the consent order is the final order in respect of the oppression petition.

[28] With regard to the parties to the consent order, except of the company which was not a party in the oppression petition, the rest of the parties in the oppression petition and this action are the same. However the company was clearly affected by the consent order because the shares that were to be sold pursuant to the consent order belong to the company.

[29] In respect of issues raised in this case and in the oppression petition, I have already alluded to Annexure 3 in the written submissions by learned counsel for the respondents and agreed that the issues in both actions are the same or substantially the same and traverse the same grounds.

[30] Thus having considered the evidence and the circumstances in its entirety, I hold the view that the consent order in the oppression petition estops the applicants from raising the same issues again in this application against the respondents.

[31] It is also pertinent to note that in Suit 674, the applicants have filed a counter claim against the respondents seeking *inter alia* a specific performance of the consent order with regard to the sale and purchase of the shares belonging to Folin Brothers in Folin Food Processing Sdn Bhd at the 'fair market value' as determined by Ernst & Young, the appointer valuer. In this regard, I agree with the submissions by the respondents that the applicants, by taking a completely inconsistent stand in this proceedings by raising issues which have been settled by the consent order, are abusing the court process for their advantage.

[32] As to the merits of the application, the applicants raised the issue of unauthorized payments to certain legal firms and making use of Folin Brothers assets to pay the legal fees without any taxation in defending the oppression petition to which I have alluded to earlier. The applicants argued that in the oppression petition the respondents were sued as Directors of Folin Food Processing Sdn Bhd and not in their capacity as liquidators of Folin Brothers. Therefore they ie the respondents should not have used the assets of Folin Brothers to pay the legal fees in defending the oppression petition. However it must be acknowledged that the respondents were directors of Folin Food Processing Sdn Bhd only by virtue of them being the liquidators of Folin Brothers which holds 99% of the shares in Folin Food Processing Sdn Bhd.; and because of that they had to take one shares each in Folin Food Processing Sdn Bhd and hold them in trust for Folin Brothers in order to sit on the board of Folin Food Processing Sdn Bhd to safeguard the interest of Folin Brothers which is the majority shareholder in Folin Food Processing Sdn Bhd. The taking up of one share each is a requirement under the M & A of Folin Food Processing Sdn Bhd for the respondents to sit on the Folin Food Processing Sdn Bhd's Board. It is not their choice. Could the respondents, as liquidators of Folin Brothers, left the management of Folin Food Processing Sdn Bhd without the interest of Folin Brothers which hold 99% of the shares capital in Folin Food Processing Sdn Bhd being unrepresented on the board? In my view, it is surely not. In this respect, the applicants have not shown that when the respondents acted as directors representing Folin Brothers in Folin Food Processing Sdn Bhd, the respondent has acted against the interest of Folin Brothers. In fact I would say that in defending the oppression petition the respondents were acting in the interest of Folin Brothers because the latter being the majority shareholder was accused of being oppressive of the minority in Folin Food Processing Sdn Bhd.

[33] With regard to the allegation that payments were made to certain legal firms for services rendered and which payments were not made subject to taxation as required under r. 173 Companies Winding Up

Rules 1972, my view is that this argument is misconceived. In my opinion r. 173 has no application in this case. The 'services' rendered under that rule are services in relation to the performance of the official duty of the liquidators. In this case the payment were not for services within the meaning of that rule.

[34] It is also to be observed from the applicants' affidavit in support (at para. 34) that some of the so-called unauthorized payments to a legal firm was made between 1996-2006. The payment to the legal firm of Joseph Yeo & Co was made in 2001, as can be seen from paragraph 45 of the same affidavit. However, it was only in 2008 that the committee of investigation (of which the 1st applicant was also a member) asked for an explanation as to the payments made. The question therefore is that, why was no action taken against the liquidators then? It appears therefore these issues were raised as afterthought to beef up the applicants' application.

[35] The applicants also said that all the creditors and 75% of the contributories supported the removal of the respondents as joint liquidators of Folin Brothers. My view on this argument is this: first of all, the 75% contributories comprise of the applicants themselves. Thus this argument is self-serving argument and devoid of merit. Secondly, this factor though self-serving may be relevant but it is not the important factor to consider. More importantly the applicants must show that the liquidators ie, respondents herein in discharging their duties have not and could not act impartially or objectively to protect the interest of the company, its shareholders and creditors.

[36] It is a settled principle that a liquidator is to act in the interest of the company, its contributories and creditors and not for themselves. Thus to remove a creditor it must be shown that the liquidator can no longer act impartially and objectively to protect those mentioned interests. A liquidator is a servant of the court and answerable for his acts as a liquidator to the court. Therefore the court should be slow to interfere with a liquidator in discharging his duty except in the clearest of cases where there is conflict of interest or where it can be shown that the liquidator is no longer a fit and proper person to continue as a liquidator. Thus, on the above principle, for the applicants to succeed in this case the applicants must show that the respondents as liquidators have abused their position for personal gain or benefit and have not been able to act independently, impartially and objectively in the interest of the company and its creditors. In other words, the applicants must show that the respondents are no longer fit and proper persons to continue as liquidators for Folin Brothers. On the other hand, I would say that by challenging the valuation of Folin Food Processing Sdn Bhd's shares

by Ernst & Young as being manifestly low compared to the shares actual market value, the respondents have demonstrated their impartiality and integrity in protecting the interests of the company Folin Brothers and its creditors.

[37] The respondents also contended that the applicants have filed this application with an ulterior motive. The argument advanced for this contention is that the respondents as liquidators stand in the way of the applicants purchasing the Folin Brothers shares in Folin Food Processing Sdn Bhd at a much lower value than the actual market value. If one is to consider the fact that the respondents have taken action to challenge the valuation of the shares by Ernst & Young by filing 674 Suit; and that the applicants have responded to that action by filing a counter claim against the respondents for specific performance of the consent order which directs that a sale and purchase agreement should be entered into between the parties once the fair market value of the shares had been obtained, this argument makes lot of sense.

[38] Thus looking at the whole circumstances of the case in its proper perspective, I am of the view that the application in encl. 368 was made not in the interests of the company, Folin Brothers in liquidation. Therefore, I hold that the application is an abuse of process and accordingly I shall dismiss encl. 368 with cost to the respondents. Cost is ordered to be paid by the applicants personally.